

NTSB Order No.
EM-182

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 13th day of May, 1996

ROBERT E. Kramek, Commandant, United States Coast Guard,

v.

JAMES MICHAEL HARRIS, Appellant

Docket ME-162

OPINION AND ORDER

Appellant, by counsel, seeks review of a decision of the Commandant (Appeal No. 2570, dated July 28, 1995) affirming a decision entered by Coast Guard Administrative Law Judge Peter A. Fitzpatrick on February 16, 1994, and an order issued by him on May 19, 1994, following an evidentiary hearing on January 12, 1994.(1) The law judge sustained charges of Use of Dangerous

(1) Copies of the decision of the Commandant and of the decision and order of the law judge were attached to this NTSB order.

Drugs, Addiction to the Use of Dangerous Drugs, and Misconduct and ordered that appellant's Merchant Mariner's License (No. 578217) be revoked. For the reasons discussed below, appellant's appeal, to which the Coast Guard filed a reply in opposition, will be denied.(2)

On an April 1, 1991 application for a renewal of his merchant mariner's license and in testimony in an unrelated Coast Guard proceeding given on January 27, 1993, appellant indicated that he had never used or been addicted to narcotic drugs. The Coast Guard in this proceeding advanced evidence, in the form of a transcript of appellant's sworn testimony on August 3, 1987, in a divorce case in Maryland, that, inter alia, appellant for a period of almost two years, ending in April 1987, had a "two gram a day cocaine habit" and had obtained treatment for drug and alcohol dependency.

The law judge and the Commandant concluded that these judicial admissions, made in open court in response to questions elicited by appellant's own attorney, provided sufficient proof, under the relevant evidentiary standard for an administrative hearing, to establish both the charges of dangerous drug use and addiction and of misconduct as well, in that, if the divorce

(2) We agree with the Coast Guard that the document attached as Exhibit L to the appellant's brief, which purports to reflect a substance abuse center's findings that appellant on several dates in 1995 was drug and alcohol free, represents an improper, extrajudicial submission. While that document has accordingly been given no weight in our consideration of appellant's appeal, we think it of doubtful relevance in this proceeding, involving as it does allegations of falsifications and fraudulent statements about drug use and addiction occurring years earlier.

proceeding testimony about appellant's drug history were truthful, his post-1987 license application and hearing testimony could not have been.(3) They so concluded notwithstanding the appellant's testimony in this proceeding that he had lied about drug use in the divorce proceeding, but had told the truth on the license renewal application and in the subsequent Coast Guard hearing.(4)

(3)The specifications sustained in support of the charge of misconduct alleged as follows:

FIRST SPECIFICATION: In that you, while acting under the authority of your merchant mariner's license, and while applying for the renewal of said license, did, on or about April 1, 1991, wrongfully and fraudulently certify on the license application that you had never used or been addicted to the use of narcotics in violation of 18 USC # 1001.

* * * * *

THIRD SPECIFICATION: In that you, while acting under the authority of your merchant mariner's license, and while giving sworn testimony during an administrative proceeding against said captioned licenses, did, on January 27, 1993, wrongfully lie under oath by falsely claiming that you had never used drugs, in violation of 18 USC # 1001.

Although we read the "in violation of 18 USC # 1001" language in these specifications to reflect no more than the Coast Guard's belief that the alleged conduct prefacing the referenced statute was proscribed by it, it could be construed as notice that the possible criminality of appellant's alleged conduct under that law would be at issue in the proceeding before the Coast Guard. Since, however, the Commandant's authority in a matter such as this one is limited to actions against a mariner's license or document, and cannot directly affect his personal liberty, it would be advisable, we think, to avoid terminology in specifications that suggests that determinations involving criminal accountability will be made.

(4) Appellant testified, in effect, that he had made up the story about drug use in order to convince the divorce court that he had spent a workman's compensation award that he feared he might have to share with his wife. This deception was necessary,
(continued...)

The appellant argues on appeal that his divorce court testimony concerning drugs must be deemed insufficient to establish the Coast Guard's charges because those charges allege criminal conduct that the Coast Guard should not be permitted to prove solely by reliance on an uncorroborated admission. We find no merit in the argument.(5)

Assuming, for purposes of appellant's argument, that a prosecutor would need more than a confession to obtain a criminal conviction does not mean that the Coast Guard needed evidence independent of the divorce court testimony to prove its charges in this proceeding, in which no criminal liability could be established and no criminal sanction could be imposed.(6) The burden of proof is greater in a criminal case than in a civil or administrative matter not because of the content or nature of the

(4)(....continued)

according to the appellant, because while the money had actually been given to his father, he did not want to be drawn into the divorce.

We are not, on this appeal, directly asked to review the validity of the Coast Guard's rejection of appellant's explanation for his divorce proceeding testimony. Rather, as more fully explained above, we are called upon only to determine whether the testimony given in the divorce court was sufficient to prove the charges in this proceeding.

(5) We are also doubtful of the correctness of the appellant's insistence that the Coast Guard's two drug charges alleged criminal conduct. Drug addiction, for example, is not considered a crime, and 18 USC # 1505 does not, as counsel for appellant asserts, referring to a dismissed specification (See Brief at 12), relate to the use of illegal drugs.

(6) Because we find no merit in appellant's position that evidence corroborative of the judicial admissions was required, we have no need to determine whether the testimony of appellant's wife, in the divorce proceeding, was adequate for that purpose. She there testified to hearsay knowledge that he was using drugs.

specific conduct charged, as appellant appears to believe, but because of the more serious consequences that the establishment of a criminal charge generally poses; namely, the potential for loss of personal freedom through imprisonment. Since the appellant was not exposed to the risk of such punishment in this proceeding, his possible criminal accountability in other fora for the conduct alleged in the specifications underlying the misconduct charge did not, in our judgment, obligate the Coast Guard to meet the evidentiary standards that he argues would apply in a criminal trial.'

In view of the foregoing, we think it of no consequence that appellant's judicial admissions might not be sufficient to support criminal convictions.(8) Appellant's sworn testimony in the divorce proceeding clearly contradicted sworn statements he later gave to the Coast Guard concerning drug use and addiction. The Coast Guard, having given the appellant a full opportunity to explain the disparities, was entitled, we believe, to accept the

(7) The appellant asserts that the Coast Guard Investigating Officer "certainly acted as if he was in a criminal proceeding by reading Respondent his Miranda rights during trial" (Brief at 12). We do not know why the I.O. felt it necessary to mirandize the appellant, who had essentially already admitted to lying under oath in the divorce proceeding. At the same time, whether he merely wanted to impress upon the appellant the importance of answering truthfully, or believed that the appellant ought to be alerted to the prospect that his answers could lead to subsequent criminal prosecution elsewhere, the I.O.'s actions did not convert this license proceeding into a criminal matter.

(8) As we stated long ago in response to a similar challenge to the use of a civil standard of proof: "Because a lower order of interest is at stake in civil cases, the concomitant requirements of proof are less stringent than in criminal cases." See *Commandant v. Torregano*. 1 NTSB 2355, 2356 (1972).

divorce proceeding testimony as probative, reliable, and substantial proof in support of its charges, and to reject, as not creditable, appellant's testimony in this proceeding as to when he was lying and when he was telling the truth.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is denied, and
2. The Commandant's decision affirming the decision and order of the law judge is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.